

Message Text

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62

ORIGIN EB-07

INFO OCT-01 EUR-12 NEA-10 ISO-00 L-03 EA-07 AF-06 TRSE-00

COME-00 SIG-01 PCH-16 CIAE-00 DODE-00 PM-04 H-02

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NEA:SSOBER EUR/EE: CBROWN

EA/EP:RIMUS

AF/EPS:RBDUNCAN

TREAS:FMARESCA (SUBS)

COMMERCE:DARRILL (SUBS)

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R 031712Z APR 76

FM SECSTATE WASHDC

TO ALL DIPLOMATIC POSTS

AMEMBASSY BEIRUT BY POUCH

AMEMBASSY BUDAPEST BY POUCH

AMEMBASSY BERLIN BY POUCH

AMEMBASSY MOSCOW BY POUCH

AMEMBASSY PRAGUE BY POUCH

AMEMBASSY SOFIA BY POUCH

AMEMBASSY WARSAW BY POUCH

AMEMBASSY DAMASCUS BY POUCH

XMT AMEMBASSY BEIRUT

AMEMBASSY BUDAPEST

AMEMBASSY BERLIN

AMEMBASSY MOSCOW

AMEMBASSY PRAGUE

AMEMBASSY SOFIA

AMEMBASSY WARSAW

AMEMBASSY DAMASCUS

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INFORM CONSULS

E.O. 11652: N/A

TAGS: EINV

SUBJECT: USG POLICY CONCERNING VALUATION OF EXPROPRIATED PROPERTY

REF: STATE A-10523 (DECEMBER 28, 1973)

JIDDA AND KUWAIT FOR INFORMATION ONLY

1. THE CIEP INTERAGENCY COORDINATING GROUP ON EXPROPRIATION, THE PRIMARY MECHANISM WITHIN THE USG FOR COORDINATING IMPLEMENTATION OF U.S. EXPROPRIATION POLICY, HAS BEEN REVIEWING THAT POLICY WITH A VIEW TOWARD CLARIFYING CERTAIN ASPECTS OF IT AND IMPROVING ITS IMPLEMENTATION. THE RESULTS OF THIS REVIEW, INsofar AS THEY RELATE TO THE POSITION OF THE USG CONCERNING VALUATION OF EXPROPRIATED PROPERTY, ARE STATED BELOW, AND ARE INTENDED TO SUPPLEMENT THE GUIDANCE PREVIOUSLY PROVIDED ALL DIPLOMATIC POSTS BY REF AIRGRAM AND ITS ENCLOSURE (THE JANUARY 1972 PRESIDENTIAL POLICY STATEMENT ON "ECONOMIC ASSISTANCE AND INVESTMENT SECURITY IN DEVELOPING NATIONS"). POSTS WILL BE INFORMED OF THE RESULTS OF OTHER ASPECTS OF THE EXPROPRIATION GROUP'S REVIEW IN DUE COURSE.

2. POSTS ARE REQUESTED TO ASSURE APPROPRIATE HOST GOVERNMENT OFFICIALS ARE MADE AWARE OF THIS STATEMENT OF USG VIEWS (PARAS. 3 THROUGH 6, BELOW). THE TIMING AND MANNER OF PRESENTATION ARE LEFT TO POSTS' DISCRETION, ALTHOUGH AN OVERLY FORMAL APPROACH, E.G., A FORMAL WRITTEN NOTE, MIGHT GIVE THE PRESENTATION AN UNINTENDED SIGNIFICANCE AND SHOULD BE AVOIDED. IN DOING SO, POSTS MAY DRAW FROM THE Q'S AND A'S AT PARA. 7 IN POINTING OUT THAT IT IS INTENDED AS A REITERATION AND CLARIFICATION OF GENERAL LIMITED OFFICIAL USE
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USG POLICY. POSTS ARE REQUESTED TO INFORM THE DEPARTMENT OF THE PRESENTATION WHEN MADE AND ANY REACTIONS. WE RECOGNIZE THAT IN SOME INSTANCES, AS IN A CASE WHERE ONGOING NEGOTIATIONS MIGHT BE THREATENED BY A PRESENTATION OF USG POLICY, POSTS MAY FEEL IT DESIRABLE TO ALLOW AN EXTENDED DELAY BEFORE MAKING THE REQUESTED PRESENTATION. IN SUCH A CASE, THE POST SHOULD INFORM THE DEPARTMENT OF THE REASONS THAT MAKE AN EXTENDED DELAY DESIRABLE AND MAKE AN APPROPRIATE RECOMMENDATION. JIDDA AND KUWAIT WILL RECEIVE SEPARATE INSTRUCTIONS SUBSEQUENTLY.

3. BEGIN TEXT: IT IS THE LONGSTANDING AND CONTINUING

POSITION OF THE USG THAT INTERNATIONAL LA' REQUIRES PAYMENT OF FAIR MARKET VALUE FOR EXPROPRIATED PROPERTY, CALCULATED AS IF THE EXPROPRIATORY ACT HAD NOT OCCURED OR WERE NOT THREATENED. SINCE MARKET VALUE IS OFTEN NOT DIRECTLY ASCERTAINABLE, AND SINCE THERE USUALLY ARE NO RECENT SALES OF COMPARABLE PROPERTIES TO WHICH TO REFER, MARKET VALUE GENERALLY MUST BE APPROXIMATED BY INDIRECT METHODS OF VALUATION. THESE INCLUDE:

A. THE GOING-CONCERN APPROACH, WHICH ATTEMPTS TO MEASURE EARNING POWER (AND SO ENCOMPASSES ELEMENTS SUCH AS LOSS OF FUTURE PROFITS WHICH MAY BE BASED ON PROJECTIONS OF PAST EARNINGS OR ESTIMATES OF FUTURE EARNINGS), AND WHICH IN THE VIEW OF THE USG GENERALLY BEST APPROXIMATES MARKET VALUE. THE USG RECOGNIZES THAT THERE MAY BE CIRCUMSTANCES IN WHICH APPLICATION OF THIS METHOD IS IMPRACTICABLE, OR WHERE IT MIGHT OPERATE UNFAIRLY: FOR EXAMPLE, WHERE AN INVESTMENT HAS A LIMITED HISTORY OF OPERATING RESULTS, OR WHERE EXPROPRIATION OCCURS AFTER SIGNIFICANT COSTS ARE INCURRED BUT BEFORE A REVENUE-GENERATING STAGE IS REACHED. THIS METHOD OF VALUATION IS ALSO VULNERABLE TO GOVERNMENTAL ACTIONS WHICH ADVERSELY AFFECT PROFITABILITY, SUCH AS INCREASED TAXES, THREAT OF CANCELLATION OF CONTRACTUAL OR CONCESSIONARY RIGHTS, OR WITHDRAWALS OF PRIVILEGES. THE USG BELIEVES THAT SUCH ACTIONS TAKEN FOR THE PURPOSE OF OR WHICH HAVE THE EFFECT UNFAIRLY OF INFLUENCING COMPENSATION MAY NOT PROPERLY BE ALLOWED TO DO SO.

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B. THE REPLACEMENT COST OF THE PROPERTY AT THE TIME OF EXPROPRIATION LESS ACTUAL DEPRECIATION, A STANDARD WHICH IS LIKELY TO YIELD AN AMOUNT SUBSTANTIALLY GREATER THAN BOOK VALUE BUT WHICH DOES NOT TAKE INTO ACCOUNT EARNING CAPACITY, IS OF LIMITED USE IN VALUING INTANGIBLES, AND IN VIEW OF THE USG, IS GENERALLY LESS ACCEPTABLE IN MOST CIRCUMSTANCES THAN THE GOING-CONCERN APPROACH.

C. BOOK VALUE, OR SOME VARIATION OF IT, WHICH (UNLIKE THE REPLACEMENT-COST APPROACH) VALUES ASSETS AT ACQUISITION COST LESS DEPRECIATION--A FIGURE WHICH IN MOST CASES

BEARS LITTLE RELATIONSHIP TO THEIR ACTUAL VALUE. THE USG BELIEVES THIS TO BE GENERALLY THE LEAST ACCEPTABLE METHOD FOR VALUATION OF EXPROPRIATED PROPERTY.

4. THE USG RECOGNIZES THAT NO SINGLE METHOD OF VALUATION IS VALID UNDER ALL CIRCUMSTANCES. THE METHOD OR COMBINATION OF METHODS MOST LIKELY TO PROVIDE JUST COMPENSATION FOR EXPROPRIATED PROPERTY VARIES, AND DEPENDS UPON THE ATTENDANT CIRCUMSTANCES OF THE PARTICULAR CASE. THE

USG ALSO RECOGNIZES THAT NON-MONETARY ASPECTS OF SETTLEMENTS--FOR EXAMPLE, ASSURED ACCESS TO SOURCES OF SUPPLY, PREFERENTIAL PRICING, OR NEW ARRANGEMENTS FOR THE PROVISION OF TECHNICAL OR OTHER SERVICES ON A CONTRACTUAL BASIS--MAY IN CERTAIN INSTANCES CONSTITUTE ELEMENTS OF COMPENSATION.

5. THE USG BELIEVES THAT ISSUES CONCERNING VALUATION OF EXPROPRIATED PROPERTY ARE BEST RESOLVED BY THE PARTIES THEMSELVES THROUGH NEGOTIATION, AND STANDS READY TO FACILITATE DISCUSSIONS BETWEEN THE PARTIES AIMED AT ACHIEVING A MUTUALLY ACCEPTABLE OUTCOME. SINCE THE USG RECOGNIZES THAT QUESTIONS OF VALUATION OFTEN POSE COMPLEX AND SENSITIVE ISSUES IN CASES OF EXPROPRIATION, THE USG ALSO SUPPORTS INDEPENDENT APPRAISAL AS A PROCEDURAL METHOD FOR RESOLVING THEM. MORE BROADLY, THE USG FAVORS AGREEMENT IN ADVANCE ON DISPUTE SETTLEMENT MECHANISMS APPLICABLE TO THE FULL RANGE OF CONTENTIOUS ISSUES CAPABLE OF ARISING BETWEEN HOST GOVERNMENTS AND FOREIGN INVESTORS,

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AND SUBSEQUENT RESORT TO THEM AS REQUIRED BY THE PARTIES' LEGAL OBLIGATIONS. IN SUCH CASES, FAILURE TO MEET SUCH ARBITRAL OR OTHER OBLIGATIONS OF ITSELF MAY CONSTITUTE A DENIAL OF JUSTICE IN VIOLATION OF INTERNATIONAL LAW. THE USG PARTICULARLY ENCOURAGES USE OF THE FACILITIES OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ISCID), A MEMBER OF THE WORLD BANK GROUP, AND THE MAJOR EXISTING INTERNATIONAL INSTITUTION INTENDED SPECIFICALLY TO HELP RESOLVE INVESTMENT DISPUTES.

6. USG POLICY CONCERNING VALUATION OF EXPROPRIATED PROPERTY WAS MOST RECENTLY ELABORATED IN A PUBLIC STATEMENT ON "FOREIGN INVESTMENT AND NATIONALIZATION" ISSUED BY THE DEPARTMENT OF STATE ON DECEMBER 30, 1975. THE TEXT OF THAT STATEMENT FOLLOWS:

BEGIN TEXT: THERE HAVE BEEN SIGNIFICANT DEVELOPMENTS DURING THE PAST YEAR CONCERNING FOREIGN INVESTMENTS BY U.S. PRIVATE FIRMS. THE SECRETARY, AT THE 7TH SPECIAL SESSION ON SEPTEMBER 1 AND AT CIEC DECEMBER 16, EMPHASIZED THE U.S. BELIEF THAT FOREIGN PRIVATE INVESTMENT CAN MAKE A VERY SUBSTANTIAL CONTRIBUTION TO ECONOMIC DEVELOPMENT. THERE HAVE ALSO BEEN A NUMBER OF ACTUAL OR CONTEMPLATED NATIONALIZATIONS INVOLVING U.S. FIRMS, AND ENSUING SETTLEMENT NEGOTIATIONS. IN THESE CIRCUMSTANCES, THE DEPARTMENT WISHES TO REITERATE PERTINENT U.S. POLICY.

THE PRESIDENT OF THE UNITED STATES, IN JANUARY 1972, DREW ATTENTION TO THE IMPORTANCE WHICH THE UNITED STATES ATTACHES TO RESPECT FOR THE PROPERTY RIGHTS OF ITS NATIONALS.

HE STATED THAT THE POLICY OF THE UNITED STATES CONCERNING EXPROPRIATORY ACTS INCLUDES THE POSITION THAT:

QUOTE: UNDER INTERNATIONAL LAW, THE UNITED STATES HAS A RIGHT TO EXPECT:

--THAT ANY TAKING OF AMERICAN PRIVATE PROPERTY WILL BE NON-DISCRIMINATORY;
--THAT IT WILL BE FOR A PUBLIC PURPOSE; AND
--THAT ITS CITIZENS WILL RECEIVE PROMPT, ADEQUATE, AND EFFECTIVE COMPENSATION FROM THE EXPROPRIATING COUNTRY.
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UNQUOTE.

WITH REGARD TO CURRENT OR FUTURE EXPROPRIATIONS OF PROPERTY OR CONTRACTUAL INTERESTS OF U.S. NATIONALS, OR ARRANGEMENTS FOR QUOTE PARTICIPATION UNQUOTE IN THOSE INTERESTS BY FOREIGN GOVERNMENTS, THE DEPARTMENT OF STATE WISHES TO PLACE ON RECORD ITS VIEW THAT FOREIGN INVESTORS ARE ENTITLED TO THE FAIR MARKET VALUE OF THEIR INTERESTS. ACCEPTANCE BY U.S. NATIONALS OF LESS THAN FAIR MARKET VALUE DOES NOT CONSTITUTE ACCEPTANCE OF ANY OTHER STANDARD BY THE UNITED STATES GOVERNMENT. AS A CONSEQUENCE, THE UNITED STATES GOVERNMENT RESERVES ITS RIGHTS TO MAINTAIN INTERNATIONAL CLAIMS FOR WHAT IT REGARDS AS ADEQUATE COMPENSATION UNDER INTERNATIONAL LAW FOR THE INTERESTS NATIONALIZED OR TRANSFERRED. END TEXT.

7. THE FOLLOWING POINTS, SET FORTH IN Q-AND-A FORM, MAY BE DRAWN UPON IN CLARIFYING TO HOST GOVERNMENT OFFICIALS THE PURPOSE OF OUR PRESENTATION, AND PARTICULARLY OUR PUBLIC STATEMENT OF DECEMBER 30, 1975.

Q. WHAT ARE THE SPECIFIC COUNTRIES THAT HAVE TAKEN NATIONALIZATION ACTIONS?

A. THERE ARE A NUMBER, BUT OUR INTENTION IS NOT TO SINGLE ANY OUT. THIS IS A GENERAL STATEMENT OF POLICY, GENERALLY APPLICABLE TO ALL U.S. FOREIGN INVESTMENTS IN ALL COUNTRIES.

Q. WHAT GOOD THEN, IF INDIVIDUAL COUNTRIES ARE NOT DISCUSSED, IS IT FOR US TO NOW MAKE THE STATEMENTS. HOW WILL WE FOLLOW THROUGH?

A. THIS IS A STATEMENT OF THE POLICY THE U.S. IS FOLLOWING AND WILL FOLLOW IN EACH CASE AND FORUM WHERE IT IS PERTINENT. IT IS A REITERATION AND CLARIFICATION OF GENERAL USG POLICY ON NATIONALIZATION CASES. MOREOVER, IT IS A BASIS FOR THE POSITION THAT WE ARE TAKING IN INTER-

NATIONAL (UN, OECD AND OAS) DISCUSSIONS OF THE POSITION
OF MNCS IN FOREIGN COUNTRIES AND THE OBLIGATIONS OF
FOREIGN GOVERNMENTS TOWARD THEM. THE SECRETARY HAS RECENT-
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LY REITERATED THE IMPORTANCE THE U.S. ATTACHES TO THE
POSITIVE ROLE OF FOREIGN PRIVATE INVESTMENT TO ECONOMIC
DEVELOPMENT. THE U.S. BELIEVES IN A FRAMEWORK OF
INTERNATIONAL LAW THAT IS CONDUCIVE TO A FREER FLOW OF
PRIVATE INVESTMENT AND THE BENEFITS OF CAPITAL FORMATION
AND TECHNOLOGY TRANSFER THAT FOLLOW FROM IT.

8. FOR MOSCOW AND EE POSTS: IN VIEW OF FACT THAT THIS
POSITION IS PRIMARILY CONCERNED WITH EXPROPRIATION OF
AMERICAN BUSINESS INVESTMENT, WE ARE NOT INSTRUCTING
THESE POSTS TO TAKE ACTION ON THIS MESSAGE. U.S. PRIVATE
INVESTMENT IN THESE COUNTRIES IS MINISCULE OR NON-EXISTENT.
IN THOSE FEW INSTANCES WHERE PRIVATE AMERICAN BUSINESS IN-
VESTMENT DOES EXIST, WE DO NOT ANTICIPATE PRESSURES FOR
"PARTICIPATION" BEYOND THAT ALREADY PROVIDED IN JOINT
VENTURES ARRANGEMENTS OR FOR OUTRIGHT NATIONALIZATION.
POSTS MAY, HOWEVER, AT THEIR DISCRETION CALL THIS TO THE
ATTENTION OF HOST GOVERNMENTS IF THEY BELIEVE ANY USEFUL
PURPOSE WOULD BE SERVED. FOR BUCHAREST AND BELGRADE: WE
BELIEVE THERE MAY BE SOME UTILITY IN MAKING HOST GOVTS
AWARE OF THIS; FOR BUCHAREST, THIS COULD BE DONE IN CON-
NECTION WITH EXCHANGE OF NOTES ON DECREE 223. INSTRUCTIONS
WILL BE CONTAINED IN RESPONSE TO BUCHAREST 1519.

9. FOR EMBASSY OTTAWA: EMBASSY SHOULD BRING THIS TO GOC'S
ATTENTION AS MORE REFINED AND AUTHORITATIVE GENERAL STATE-
MENT OF USG VIEWS THAN THE SUMMARY STATEMENT CONTAINED
IN AIDE-MEMOIRE OF DECEMBER 9, 1975 RELATING TO
SASKATCHEWAN POTASH.

10. REPLY SINGLY. KISSINGER

NOTE BY OC/T: POUCHED ABOVE ADDRESSEES.

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MOSCOW BY POUCH
PRAGUE BY POUCH

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WARSAW BY POUCH
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